

**SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES
COMMITTEE**

**INQUIRY INTO DEFENCE'S REQUEST FOR TENDER FOR AVIATION
CONTRACTS**

GOVERNMENT RESPONSE

November 2011

RESPONSES TO RECOMMENDATIONS

Recommendation 1 paragraph 9.28

The committee recommends that Defence:

- requires the documentation of a dedicated probity plan for all future procurements of air sustainment services to the MEAO;

Response - Agreed.

A probity plan specific to future procurements of air sustainment services to the MEAO has been developed and is attached. A specific instruction will be issued to mandate the development of a probity plan based on this template for all future procurements of air sustainment services to the MEAO. The template probity plan can also be tailored for other procurements undertaken by HQJOC, as required.

More generally, the necessary Defence procurement policy and operational guidance framework for the creation of a probity plan already exists (see Defence Procurement Policy Manual, 1 July 2011 edition (DPPM) at Chapter 5.4 *Request Documentation*, paragraphs 62, 63 and 65).

- ensures probity plans for all future procurements of air sustainment services to the MEAO identify expressly and address the risks associated with:
 - (i) proponent grievances and
 - (ii) the small and highly competitive nature of the commercial air charter market;

Response – Agreed

- implements its proposed policy of appointing probity advisors to all complex and strategic procurements and monitors closely the implementation progress and impact of this policy – in particular, ensures that a probity advisor is appointed to all future procurements of air sustainment services to the MEAO; and

The attached probity plan specifically addresses the two risks listed above.

Response – Agreed in principle

Probity advisers will be appointed where it is consistent with the existing Defence procurement policy and operational guidance. The DPPM, Chapter 3.13, paragraphs 14 to 29, provide for the appointment of probity advisers based upon the Department of Finance and Deregulation (Finance) policy that ‘the decision on whether to engage an external probity specialist should weigh the benefits of receiving advice independent of the process against the additional cost involved and include consideration of whether or not skills exist within the agency to fulfil the role’.

Based on past experience it is reasonable to assume that the future procurement of air sustainment services to the MEAO would meet the Finance policy requiring the appointment of a probity adviser, and the template Probity Plan referred to above is drafted on this basis.

- amends chapter 3.2 of the Defence Procurement Policy Manual on risk management in procurement to include references to probity risks. In particular, Defence should consider cross-referencing chapter 3.13 on ethics and probity in procurement.

Response - Agreed.

In the planned 1 December 2011 update of the DPPM, Defence will update Chapter 3.2 to expand the references to probity risk, and cross reference this chapter with Chapter 3.13 on ethics and probity in procurement. In addition, Defence will also release an updated chapter 3.13 as part of the planned 1 December 2011 update.

Recommendation 2

paragraph 10.9

The committee recommends that Defence reviews all Defence Instructions and related documents in respect of Reservists, full or part time, to ensure that real and potential conflicts of interest that might arise as a result of past, current or post separation employment are identified, reported and managed appropriately. In particular:

- (a) Defence considers whether Defence Instructions DI(G) PERS 25-2 (Employment and voluntary activities of ADF members in off-duty hours) and DI(G) PERS 25-3 (Disclosure of interests of members of the ADF) should be extended to Reservists who are not engaged in continuous full-time service; or
- (b) if there is no intention to extend the application of DI(G) PERS 25-2 and DI(G) PERS 25-3 to Reservists who are not engaged in continuous full-time service, Defence develops specific policies covering the civilian employment of, and the disclosure of conflicts of interests by, those personnel.

Response – Agreed.

Defence has incorporated DI(G) PER 25-3 into a revised version of DI(G) PERS 25-6 (Conflict of Interest and Declaration of Interest) which came into effect on 29 March 2011. The revised DI(G) PERS 25-6 applies to a “Defence Member” as defined in section 3 of the Defence Act. This definition of “Defence Member” includes Permanent members of the Navy, Army and Air Force, and members of the Reserves who (a) are rendering continuous full-time service or (b) are on duty in uniform.

DI(G) PERS 25-2 is currently under review and will be revised to include the definition of ‘Defence Member’ to align with the definition in DI(G) PERS 25-6.

As Defence has agreed to Recommendation 2(a) there is no requirement to develop the specific policies requested in Recommendation 2(b).

Recommendation 3**paragraph 10.21**

The committee recommends that, prior to the re-tendering of any future contracts for the provision of air sustainment services to the MEAO, Defence ensures that:

- (a) all Reserve personnel involved in the procurement complete a conflict of interest declaration; and

Response – Agreed.

This recommendation accords with usual Defence procurement practice as set out in the DPPM, Chapter 3.13. In addition, the attached Probity Plan contains a specific requirement in this regard.

- (b) commanding officers or supervisors in IJMOVGP:
- (i) make a risk-based assessment as to which other Reserve personnel must complete a conflict of interest declaration and which personnel do not;
 - (ii) in making a risk-based assessment, give consideration to identifying and obtaining conflict of interest declarations from Reservists who have associations with the commercial air charter industry. Such associations may include:
 - present or previous civilian employment with air transport providers;
 - financial interests in these companies or related companies; or
 - professional or social relationships with members or employees of these companies; and
 - (iii) document their decisions whether or not to require these Reservists to complete a conflict of interest declaration.

Response – Agreed in principle.

Standard Defence probity arrangements provide that only those personnel who have a genuine 'need to know' have access to confidential tender information (eg. draft requirements, tenders, and evaluation material). This ensures that personnel who are not involved in the procurement do not access confidential information relating to the process or have an ability to influence the conduct of the process.

Further, if someone in the project team is approached by someone outside the project, an obligation to report such contact has been included in the attached Probity Plan.

Accordingly, it will be the responsibility of the project manager for a future procurement of air sustainment services to ensure that all relevant personnel complete conflict of interest declarations.

Recommendation 4**paragraph 10.22**

The committee recommends Defence ensures that, in all future procurements of air sustainment services to the MEAO:

- All members of tender evaluation boards and working groups, and all persons involved in the development of requests, sign conflict of interest declarations. Such declarations:
 - (a) should be signed prior to the commencement of the tender evaluation process or the development of the request (as applicable); and
 - (b) include declarations about possible conflicts of interest arising from their employment, prior employment, financial interests in potential suppliers or relationships with persons who have interests in potential suppliers.

Response – Agreed.

This recommendation accords with Defence procurement policy and operational guidance which provides for the identification and management of conflicts of interest (see DPPM, Chapter 3.13). The probity plan templates available from the Commercial Policy and Practice Branch (CPP Branch), DMO Commercial Group, intranet site already contain a conflict of interest declaration proforma.

The timing for the completion of the conflict of interest declarations in certain circumstances is covered by the DPPM, Chapter 5.4 *Request Documentation*, paragraph 63, which states that ‘If a probity plan is required, it should be developed and approved before commencement of the tender evaluation’ at which point the conflict of interest requirements in the plan would apply (including any requirements regarding the timing for personnel to provide declarations).

In order to address the specific concerns of the Senate committee, a supplementary direction will be issued within 1JMOVGP that all future MEAO air sustainment procurement activities must have a probity plan approved at the beginning of the procurement process (i.e. not just before the commencement of the tender evaluation).

1JMOVGP will also direct that conflict declarations are to be obtained at the beginning of the procurement process. This requirement will also apply to all persons involved in the development of request documentation.

- All members of tender evaluation boards and working groups receive specific briefings on conflicts of interest and other probity matters, prior to the commencement of tender evaluations.

Response – Agreed.

This recommendation accords with existing Defence procurement policy and practice (see DPPM, Chapter 3.13). The attached probity plan also expressly includes this requirement.

Recommendation 5

paragraph 11.20

The committee recommends that Defence:

- In line with the findings of the AFCD Review, considers strategies for the improved documentation of the business case for any future decisions to re-test the market for the provision of air sustainment services to the MEAO.

Response – Agreed.

The DMO Commercial Group or the Defence Support Group, Non-Equipment Procurement Centre of Excellence (NEP COE) will assist 1JMOVGP with the drafting of any future business case for future decisions to market test the provision of air sustainment services to the MEAO, including ensuring the business case is in accordance with existing policy.

- Reviews its procurement plan for the current MEAO contract, to ensure that sufficient lead time is provided for the making of any future decisions to re-test the market, and the planning and execution of a procurement process.

Response – Agreed.

This recommendation accords with usual Defence procurement practice. For example, DPPM, Chapter 5.0, provides guidance on the development of procurement plans. The DMO Commercial Group or the NEP COE will assist 1JMOVGP, where required.

- In all future procurements of air sustainment services to the MEAO:
 - (a) continues to include in procurement strategies a requirement that members of the Air Transport Standing Offer Panel are given advance notice of any decisions to re-tender the contract, prior to the release of the RFT; and
 - (b) ensures that such requirements are implemented.

Response –Agreed in principle.

Defence will ensure that notice is provided to all potential suppliers in accordance with Commonwealth procurement policy as set out in the Commonwealth Procurement Guidelines (CPGs). For instance, paragraph 5.2 of the CPGs requires that “All potential suppliers should have the same opportunities to compete for government business and must, subject to these CPGs, be treated equitably based on their legal, commercial, technical, and financial abilities.”

Advance notice of a future procurement of air sustainment services would be provided through Defence's Annual Procurement Plan (APP) (where the procurement is conducted as an open approach to the market).

IJMOVGP will ensure that, in any future re-tendering, the tender release and closing dates for the request for tender meet or exceed the minimum time limits set out in the CPGs (see paragraphs 8.56 - 8.62; see also DPPM, Chapter 5.5 *Tender Advertising, Submission and Receipt*, paragraphs 6 – 11).

The CPGs relevantly provide:

‘8.57 Agencies need to provide sufficient time for potential suppliers to prepare and lodge a submission in response to an approach to the market. Time Limits discussed in this section represent minimum periods and should not be treated as default time limits for potential suppliers to lodge submissions.’

‘8.61 Where an agency intends to specify conditions for participation that require potential suppliers to undertake a separate registration or pre-qualification procedure, the agency must state the time limit for responding to the registration or pre-qualification in the approach to the market. Any such conditions for participation must be published in sufficient time to enable all potential suppliers to complete the registration and qualification procedures within the time limit for the procurement.’

Any future procurement process for MEAO air sustainment services will comply with the CPGs, including ensuring that there is sufficient time to enable tenderers to get aircraft onto the AO certificate.

- Implements strategies to ensure that potential tenderers have a clear and accurate understanding of how Australian industry participation is taken into account in the evaluation of tender responses, as part of the overall value for money assessment.

Response – Agreed.

This recommendation accords with existing Defence procurement policy. Defence implements the requirements of the Australian Industry Participation (AIP) National Framework via its Australian Industry Capability (AIC) program. Defence procurement guidance on the AIC program is set out in DPPM, Chapter 3.12. Defence plans to update Chapter 3.12 in its 1 December update of the DPPM.

All relevant ASDEFCON templates include clauses that explain how AIC is taken into account in the evaluation of tender responses as part of the overall value for money assessment.

- On the release of future requests for air sustainment services to the MEAO, implements the following actions to minimise the risk for potential proponent grievances:
 - (a) provides potential tenderers with an explanation of the reasons for re-tendering the contract and any changes to tender requirements from the previous request;

Response – Agreed.

This recommendation accords with existing Defence procurement policy and practice. For instance, the covering letter that forms the first part of the relevant ASDEFCON tendering and contracting template prompts the user to provide tenderers with appropriate background information about the procurement. This could include the reasons for re-tendering the contract and any key changes to tender requirements from the previous request.

- (b) provides potential tenderers with an explanation of how the evaluation criteria in the request documentation will be assessed; and

Response – Agreed in part.

Standard Defence procurement practice is to advise tenderers about the evaluation criteria and the basic rules governing tendering evaluation. In strategic and more complex procurements, the relevant ASDEFCON templates provide greater levels of specificity about how evaluation criteria are assessed, (eg by advising tenderers about what information will be used to assess which criterion). Also, if evaluation criteria are specifically ranked in terms of their relative importance or otherwise weighted, Defence procurement practice would require this order of ranking/weighting to be provided to all tenderers.

However, the detailed evaluation methodology which is used by tender evaluation teams to evaluate tenders is set out in the tender evaluation plan (TEP). In accordance with standard Commonwealth practice, the TEP is an internal document and is not normally provided to tenderers.

- (c) includes in the request documentation, where applicable, an express statement of Defence's:
 - (i) preferred solution for meeting tender requirements, including technical specifications; and

Response – Agreed in part.

Defence procurements do not tend to mandate a preferred solution as this can be seen by potential tenderers as favouring a specific tenderer and may stifle innovation and

otherwise limit the field of potential tenderers. Instead, and consistent with paragraphs 8.46 to 8.51 of the CPGs, the Defence approach is to analyse its requirements, undertake market research, and use this information to develop requirements/specifications which focus on the expected outcome from the procurement rather than specifying a particular way of meeting the requirement.

If Defence has specific requirements or technical specifications that must be met by tenderers, then Defence policy requires that these requirements and specifications be advised to tenderers. These would normally be included in the draft Statement of Work that is included as part of the request for tender.

(ii) intention to consider alternative solutions.

Response – Agreed.

This recommendation accords with existing Defence procurement practice and is reflected in standard Defence Conditions of Tender (for example, see ASDEFCON Complex Materiel Vol. 2, conditions of tender, clause 4.10).

- As a matter of priority in future tender processes for the provision of air sustainment services to the MEAO, take action on the tender evaluation issues identified by the Deloitte, AGS and AFCD Reviews, as documented at paragraph 11.15 of this report.

Response – Agreed.

The issues identified at paragraph 11.15 of the Senate inquiry report are either generally consistent with existing Defence procurement policy and practice, or are being addressed for inclusion within that framework. For example, DPPM, Chapter 5.4 *Request Documentation*, and our ASDEFCON tendering and contracting templates, provide the guidance and framework respectively for drafting request documentation. The guidance and templates cover all CPGs requirements, including minimum content and format requirements, conditions for participation, essential requirements, evaluation criteria and technical specifications.

Another example is the current work within Defence to develop Tender Evaluation Better Practice Guides for the assistance of personnel undertaking procurements. Defence recently released the *Better Practice Guide: Tender Evaluation in Simple Procurement*, and a better practice guide for tender evaluation in more complex procurements is currently under development.

Recommendation 6

paragraph 12.10

The committee recommends that in all future procurements of air sustainment services to the MEAO, Defence develops and implements tender evaluation processes for assessing respondents' fitness and propriety to contract with the Commonwealth. Such evaluation processes should:

- (a) identify criteria setting out requirements or indicators for being 'fit and proper' to contract with the Commonwealth;
- (b) specify searches that may be conducted on tender respondents, their key personnel, proposed subcontractors and any associated companies (for example, parent or subsidiary companies)—including guidance on the scope of the searches;
- (c) identify the possible implications of the findings of each of the specified searches; and
- (d) enable the identification and assessment of potential risks arising from issues identified in these searches including:
 - (i) reputational damage to the Commonwealth, should it proceed to contract with the relevant tenderer; and
 - (ii) proponent grievances about the relevant tenderer's fitness and propriety to contract with the Commonwealth.

Response to (a) – (d) above – Agreed.

In the conditions of tender for all future MEAO air sustainment services procurements (and as reflected in the attached Probity Plan), Defence will reserve the right to undertake probity searches of tenderers and key personnel in order to assess the issues set out in the above recommendations.

This will require the tenderer, its proposed subcontractors, and their respective key personnel, to sign relevant consent forms – allowing the Commonwealth to seek such information.

The relevant clause for inclusion in the conditions of tender is as follows:

"The Commonwealth reserves the right to perform such security, probity or financial checks and procedures as it may consider necessary in relation to the tenderer and its subcontractors, their officers, employees, partners, associates or related entities (including consortium members and shareholders and their officers or employees if applicable). These checks may include (without limitation):

- security and probity checks including criminal history checks;
- corporate history checks;
- media checks;
- litigation searches (past, present or pending);

- reference checks; and
- any other checks which the Commonwealth considers relevant.

Each Tenderer agrees to provide, at its cost, all reasonable assistance to the Commonwealth to facilitate these checks being carried out (including executing all necessary consent forms)."

It should also be noted that all the current ASDEFCON templates already contain clauses that seek a significant amount of information of this kind, including :

- the tenderer's proposed key personnel. The tenderers' responses to these questions should provide the necessary information to determine if one of a tenderer's proposed key personnel fails to meet the requirements of DI(G) PERS 25-6 (Conflict of Interest and Declaration of Interest);
- the tenderer's financial position; and
- a declaration from the tenderer that the information they have provided is accurate and not misleading.

Defence is currently developing a Tender Evaluation Better Practice Guide for complex procurements. This document will include detailed guidance on searches that may be conducted on tender respondents, their key personnel, proposed subcontractors and any associated companies, and implications of the findings.

Recommendation 7**paragraph 12.16**

The committee recommends that Defence includes in all future tender evaluation documentation for the procurement of air sustainment services to the MEAO:

- specific provisions on conducting financial risk assessments of tender responses involving charter broker arrangements; and
- essential requirement that proposals involving any form of broker-based solution – including sub-contracting arrangements – must include the complete financial statements of the proposed air charter operator and any other proposed sub-contractors.

Response – Agreed.

The necessary Defence procurement policy and operational guidance framework already exists to implement these recommendations (see DPPM, Chapter 3.3 *Financial Policy and Advice in the Procurement Process*). Defence's existing probity and tender evaluation plan templates, and the ASDEFCON conditions of tender, permit financial statements to be obtained from tenderers and financial risk assessments to be undertaken. The Financial Investigation Service (FIS), DMO Commercial Group, is able to undertake financial assessments for procurement related matters.

The attached Probity Plan also requires suggested financial risk assessment to be undertaken as part of a future procurement process for air sustainment services to the MEAO, and requires the probity adviser to ensure these matters are considered as part of the tender evaluation.

The committee requests that the Auditor-General:

- Conduct a performance audit of the tender process in respect of RFT AO/014/09, with a focus on probity risk management. In particular, the audit should evaluate the following matters, with a view to identifying any further areas for future improvement:
 - (a) Defence's governance arrangements for the identification and management of significant probity risks to the procurement process, including conflicts of interest, confidentiality and proponent grievances;
 - (b) Defence's program of procurement governance and process reforms, including those outlined in its evidence to the committee; and
 - (c) Any other matters considered relevant to probity risk management, or related governance matters, in respect of the procurement of air sustainment services to the MEAO.
- After sufficient time has elapsed, conduct a second review to examine Defence's implementation of its program of procurement governance and process reforms. In particular the review should:
 - (a) evaluate the implementation progress and impact of the reforms outlined in Defence's evidence to the committee; and
 - (b) recommend, as necessary, any further reforms to probity risk management and other governance arrangements in respect of the procurement of air sustainment services to the MEAO.

Response – Not applicable.

This recommendation relates to the Auditor-General. Defence will provide all necessary support to the Auditor-General, as required.

Recommendation 8

paragraph 12.23

The committee recommends that Defence report back to the committee by 1 May 2012 on progress being made to implement the reforms it has announced including:

- the ongoing performance of the 2010 contract, including the cost per mission, the realisation of projected savings, the continuing need for the increased cargo volumetric requirements and the contractor's compliance with the tender requirements;
- progress on the establishment of the Centre of Excellence that is intended 'to support a more robust and consistent commercial approach to non-equipment procurement';
- the work of the newly created Non-Equipment Chief Procurement Officer; and
- the strategies for the recruitment and retention of suitably skilled procurement professionals.

Response – Agreed

Defence will report back to the committee as requested.

Recommendation 9

paragraph 12.25

Although the majority of recommendations apply to the procurement of air sustainment services to the MEAO, the committee recommends that Defence consider incorporating the principles and practices underpinning them as part of Defence wide non-equipment procurement policy.

Response – Agreed.

The majority of the principles and practices discussed in the recommendations are either consistent with existing Defence procurement policy, practice or templates (such as the DPPM or the ASDEFCON templates) or will soon be incorporated as a result of the DPPM 1 December 2011 update and the Tender Evaluation Better Practice Guides. These principles and practices apply to all Defence procurement as described in the DPPM.

In relation to training staff in the practical application of these principles and practices, for a number of years DMO, on behalf of Defence, has been working to improve the content of Defence procurement training courses. In June 2011, CPP Branch, DMO Commercial Group, finalised the design and content of the Simple Procurement Refresher course in consultation with representatives from Defence Education and Training Development (DETD). Delivery of this training course is expected to commence in October 2011. CPP Branch and DETD are also finalising the design of the Complex Procurement Refresher course. Improving Defence procurement training courses will lead to more highly skilled procurement professionals.

Corrections to Senate Report

1. Paragraph 3.7 of the Senate inquiry report states:

‘Preparation for re-tender

3.7 Defence commenced preparation for the re-tendering process in late 2009. Two key stages—which are discussed below—were the establishment of the Air Transport Standing Offer Panel in November 2009, and the preparation and approval of the procurement strategy. Headquarters, 1st Joint Movement Group (HQ1JMOVGP), within the Joint Operations Command, was the area within Defence responsible for conducting the procurement. The Commanding Officer of 1JMOVGP was Group Captain Robert Barnes. His superior officer was the Deputy Chief of the Joint Operations Command, Rear Admiral Ray Griggs.’

This is not factually correct. The command relationship is between CO 1 HQJMOVGP (ie Group Captain Barnes) and CJOPS. In practical terms, DCJOPS deals with day to day issues. While DCJOPS is a superior officer from a rank perspective, this is not in a direct line accountability sense. In addition, the paragraph implies that then RADM Griggs was GPCPT Barnes’ superior officer throughout the whole process. This is not the case as then RADM Griggs did not arrive in headquarters until May 2010. RADM Griggs did not take over as DCJOPS until July 2010 having spent the first 5 weeks as acting CJOPS. DCJOPS during November 2009 was AVM Greg Evans (although between November 2009 and July 2010 there were several DCJOPS primarily due to a run of ill health).

2. The Senate inquiry report refers in a number of places to ‘Dr Raymond Bromwich’. Mr Bromwich does not hold a doctorate, and accordingly the report should be corrected so that he is referred to as ‘Mr Raymond Bromwich’. The relevant references are as follows:

page 23, footnote 104
page 26, footnotes 119 & 120
page 27, footnote 126
page 57, paragraph 4.2 and footnotes 1,2 & 4
page 58, footnotes 9 & 10
page 59, footnotes 11 and 12 (twice)
page 60, footnotes 17,18, 19, 20, 21 and 23
page 71, footnotes 42 & 43
page 75, paragraph 5.32 and footnotes 68 & 69
page 115, footnote 16
Appendix 4
Appendix 5 (14 July)